No. 2855.

United States
Circuit Court of Appeals
For the Ninth Circuit.

UNITED STATES OF AMERICA,
Appellee,

vs.

ASH SHEEP COMPANY, a Corporation,
Appellant.

APPELLANT'S BRIEF

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Statement of the Case

This is an appeal from a decree entered by the District Court of the United States for the District of Montana on the 10th day of February, 1916, in favor of the appellee and against the appellant. The suit was brought by the United States to enjoin trespasses by appellant on certain lands alleged to be a part of the Crow Indian Reservation in the State of Montana. It is averred that on or about the 12th day of August, 1868, the United States and the Crow Indians entered into a treaty, as a result of which, the Crow Indian Reservation was created, and that the lands trespassed on were within the boun-

daries of the Reservation so created; that they were ceded lands, to which the Indian title had not been extinguished, and were subject to the regulations formulated by the Secretary of the Interior November 27, 1911, and the act of Congress approved April 27, 1904. (33 Stat. at Large, page 352); that the defendant company grazed upon the described lands on or about the 14th day of July, 1914, and thereafter, 7100 head of sheep; that grazing permits for this land had been issued to others who paid the agreed fees for so doing; that the appellant in grazing the sheep was committing a continuing trespass, causing irreparable damage; that by reason of the trespass commited, the Crow Indians were deprived of the used lands, to their damage and to the damage of the United States in the sum of $7100.00. An injunction was prayed for, and also a judgment for $7100.00. (Bill of complaint, Tr. pp. 2-8).

In the answer, it is alleged that the lands were ceded to the United States by the Indians and were a portion of the public domain; that the Indians had no interest in them, except the interest which arose by being entitled to the proceeds, as provided by the act of Congress, which provided for the ceding of the lands. The answer denied that the Indian title had not been extinguished, and denied that the regulations of the Interior Department had application as to the issuance of permits. There is a denial that damages were sustained to the amount of $7100.00 or any sum or

amount. The answer, likewise, sets forth that in the bill of complaint, there was a misjoinder of causes of action; one in equity, asking for injunctive relief, and the other for the enforcement of a penalty, pursuant to the provisions of Section 2117 of the Revised Statutes of the United States, and it was, likewise, set forth that the damage item was a penalty and could not be enforced in an equitable action. (Answer, Tr. pp. 11-15).

On the hearing on the order to show cause, the order was vacated (Tr. p. 15) and the restraining order theretofore issued was dissolved. (Tr. pp. 15 and 16). Subsequently, the cause was heard and a decree was entered dismissing the bill of complaint. (Tr. p. 23).

An appeal was taken to this court, and a reversal of the decree was ordered, and the cause was remanded, with directions to enter judgment for the United States for the injunction prayed for, and for such damages as the court should find the plaintiff entitled to.

United States v. Ash Sheep Co., 221 Fed. 582, (See mandate, Tr. p. 25).

Upon the remanding of the cause and upon its consideration by the trial court, the United States moved for a final decree, insisting on its right to recover the penalty of $7100.00. There was no proof as to damages, and a decree was entered, pursuant to the mandate of this court, permanently enjoining the Ash Sheep Company from trespassing upon the land, and fixing the damages at

one dollar. (Tr. p. 29). From this decree, the Ash Sheep Company has appealed. (Tr. pp. 35-37).

Specification of Errors

I.

The court erred in rendering and entering a decree in favor of the United States against the appellant.

II.

There was error in holding that the lands in question were not public lands of the United States, and that the defendant did not have the right to graze its sheep thereon.

III.

There was error in holding that the lands were subject to the control or regulation of the Indian Department.

IV.

There was error in holding that the lands were still to be treated as Indian or Reservation lands.

V.

There was error in holding that the Indian Department had a right to give leases on said land or to exclude sheep therefrom or to prohibit grazing thereon.

Argument

This court in this case reversing the District Court, remanded the cause, with directions to enter judgment in favor of the United States, permanently enjoining the Ash Sheep Company from grazing its sheep on the lands which were tres-

passed upon, with directions, likewise, to ascertain the damages done on account of the trespasses committed. There was an absence of proof to show that substantial damage had been done by reason of the grazing complained of, and nominal damages were awarded, and a decree was rendered permanently enjoining the company from grazing its sheep on the lands and for nominal damages. From this decree the company has appealed, and in the consideration of the appeal, it desires to present anew the question considered on the former appeal as to whether or not the land in question is public domain. The taking of this appeal was thought necessary by reason of the institution of a new suit by the United States to recover the penalty provided for by Section 2117 of the Revised Statutes of the United States, so that the question as to whether this land is public domain would not be foreclosed from review by the Supreme Court of the United States, should it be found necessary to submit the question to that tribunal. When the case was considered by this court and disposed of, it was remanded with directions to enter judgment for the complainant for the injunction prayed for, and for such damages as the court might find the complainant entitled to. This being the order, nothing could be done in the case until a final judgment was rendered. The final judgment being rendered, an appeal was then taken, and the hearing on the appeal has been continued from time to time to

await the disposition of the action brought by the United States to recover the penalty. In the latter action in the District Court a judgment was rendered in favor of the Ash Sheep Company, and from the judgment so rendered, the United States has taken an appeal, and, as already stated, so that the decision of this court in the former appeal should not foreclose the consideration of the question as to whether the lands in question were public or were subject to the jurisdiction of the Indian Department, should it ultimately be adjudged the penalty prayed for was recoverable, the present appeal was taken.

We recognize at the outset the difficult task assumed in attempting to change the views heretofore declared by the majority of this court. We do so, however, with sanguine expectation of succeeding. The land alleged to be the land trespassed on was a portion of the Crow Reservation. An agreement was entered into by the Government and the Crow Indians, by which a cession of the lands was made to the Government, and for this land the Government was to pay $1,150,000.00. This agreement was modified and amended, so that instead of paying this money as originally provided for, it was agreed in consideration of the grant, cession and relinquishment of the land, that the United States should dispose of the same under the provisions of the Reclamation Act, the Homestead Act, the Townsite Act and the Mineral Land Laws, except as to Sections sixteen

and thirty-six, at not less than four dollars an acre, and as to the accepted sections, the Government would pay for them one dollar and twenty-five cents an acre.

33 Stat. at Large, 352.

Section 5 of the Act provides as follows:

"That before any of the lands by this agreement ceded are opened to settlement or entry the Commissioner of Indian Affairs shall cause the allotments to be made and the schedule to be prepared, as provided for in section four of this Act, and a duplicate of said schedule shall be filed with the Commissioner of the General Land Office. Upon the completion of such allotments and the filing of such schedule and after the sale or removal of such improvements the residue of such ceded lands, except sections sixteen and thirty-six, or lands in lieu thereof, which shall be reserved for common school purposes, and are hereby granted to the State of Montana for such purpose, shall be subject to withdrawal and disposition under the reclamation Act of June seventeenth, nineteen hundred and two, so far as feasible irrigation projects may be found therein. The charges provided for by said reclamation Act shall be in addition to the charge of four dollars per acre for the land, and shall be paid in annual installments as required under the reclamation Act; and the amounts to be paid for the land shall be

credited to the funds herein established for the benefit of the Crow Indians. If any lands in sections sixteen and thirty-six are included in an irrigation project under the reclamation Act, the State of Montana may select in lieu thereof, as herein provided, other lands not included in any such project, in accordance with the provisions of existing law concerning school land selections. In any construction work upon the ceded lands performed directly by the United States under the reclamation Act, preference shall be given to the employment of Crow Indians, or whites intermarried with them ,so far as may be practicable: *Provided, however,* That if the lands withdrawn under the reclamation Act are not disposed of within five years after the passage of this Act, then all of said lands so withdrawn shall be disposed of as other lands provided for in this Act. That the lands not withdrawn for irrigation under said reclamation Act, which lands shall be determined under the direction of the Secretary of the Interior at the earliest practical date, shall be disposed of under the homestead, town-site, and mineral land laws of the United States, and shall be opened to settlement and entry by proclamation of the President, which proclamation shall prescribe the manner in which these lands may be settled upon, occupied, and entered by persons entitled to make entry

thereof; and no person shall be permitted to settle upon, occupy, or enter any of said lands, except as prescribed in such proclamation, until after the expiration of sixty days from the time when the same are opened to settlement and entry: *Provided,* That as to the lands open under such proclamation the rights of honorably discharged Union soldiers and sailors of the late civil and the Spanish war or Philippine insurrection, as defined and described in sections twenty-three hundred and four and twenty-three hundred and five of the Revised Statutes, as amended by the Act of March first, nineteen hundred and one, shall not be abridged: *And provided further,* That the price of said lands shall be four dollars per acre, when entered under the homestead laws, to be paid as follows:

"One dollar per acre when entry is made, and the remainder in four equal annual installments, the first to be paid at the end of the second year.

"In addition to the price to be paid for the land, the entryman shall pay the same fees and commissions at the time of commutation or final entry as now provided by law where the price of the land is one dollar and twenty-five cents per acre.

"Lands entered under the town-site and mineral-land laws shall be paid for in amount and manner as provided by said

laws, but in no event at a less price than that fixed herein for such lands, if entered under the homestead laws, and in case any entryman fails to make such deferred payments, or any of them, promptly when due, all rights in and to the land covered by his or her entry shall at once cease, and any payments theretofore made shall be forfeited, and the entry shall be held for cancellation and canceled: *Provided,* That the lands embraced within such canceled entry shall, after cancellation of such entry, be subject to entry under the provisions of the homestead law at four dollars per acre until otherwise directed by the President, as herein provided: *And provided,* That nothing in this Act shall prevent homestead settlers from commuting their entries under section twenty-three hundred and one, Revised Statutes, by paying for the land entered the price fixed herein, receiving credit for payments previously made, except as to lands entered under said reclamation Act: *And provided further,* That when, in the judgment of the President, no more of the land herein ceded can be disposed of at said price, he may by proclamation, to be repeated at his discretion, sell from time to time the remaining land subject to the provisions of the homestead law or otherwise as he may deem most advantageous, at such price or prices, in such manner, upon such conditions, with

such restrictions, and upon such terms as he may deem best for all the interests concerned."

Section 8 provides as follows:

"That nothing in this Act contained shall in any manner bind the United States to purchase any portion of the land herein described, except sections sixteen and thirty-six or the equivalent in each township, or to dispose of said land except as provided herein, or to guarantee to find purchasers for said lands or any portion thereof, it being the intention of this Act that the United States shall act as trustee for said Indians to dispose of said lands and to expend and pay over the proceeds received from the sale thereof only as received, as herein provided."

It is contended on the part of the Government, and this contention is sustained by this court in the decision heretofore rendered, that the land in question is held in trust by the government until the title passes from the government, as provided for by Section 5 supra, and that until the title so passes from the Government, the Indian Department can exercise jurisdiction over same.

Before the passage of the Act disposing of this land, the title to same was in the Government, with the right to the possession of same vested in the Crow Indians.

Beecher v. Wetherby, 95 U. S. 517;
Spaulding v. Chandler, 160 U. S. 394.

Such right of occupancy can be terminated by Act of Congress.

Lone Wolf v. Hitchcock, 187 U. S. 553.

The Act of 1904, we contend, equally with the original agreement, provided for the ending of the Indian occupancy. As expressive of such purpose we might refer to the following articles found in the original agreement and embodied in the Act of Congress modifying and amending portions of the original agreement:

Article 3:

> "All lands upon that portion of the Reservation hereby granted, ceded and relinquished, which have, prior to the date of this agreement been allotted in severalty to Indians of the Crow tribe shall be reserved for said Indians, or where any Indians have homes on such lands they shall not be removed therefrom without their consent, and those not allotted may receive allotments on the lands they now occupy. But in case any prefer to move they may select land elsewhere on that portion of said Reservation not hereby ceded granted or relinquished, and not occupied by any other Indians, and should they decide not to move their improvements, then the same may be sold for their benefit, said sale to be approved by the Secretary of the Interior, and the cash proceeds shall be paid to the Indian or Indians whose improvement shall be so sold."

Article 4:

> "That for the purpose of segregating the ceded lands from the diminished reservation the new boundary lines described in Article I of this agreement shall, when necessary be properly surveyed and permanently marked in a plain and substantial manner by prominent and durable monuments, the cost of said survey to be paid by the United States."

And Section 4 of the Act under consideration, after providing for allotments in pursuance of Article 3, contains the following:

> "The Secretary of the Interior shall fix a reasonable time within which such Indian occupants shall elect whether they will remain on the ceded tract or remove to the diminished reservation, and where they elect to remove, he shall also fix a reasonable time within which such occupants must remove their improvements if they should choose to do so instead of having the same appraised and sold."
>
> 33 Stat. at Large, 360.

To summarize the situation as to the condition of the land, we find it to be as follows:

The school sections belonged to the State of Montana through the purchase price of same being paid by the United States. The balance of the land was subject to withdrawal and disposition under the Reclamation Act, and if the lands thus withdrawn were not disposed of within five years,

then they were subject to disposal under the homestead, townsite and mineral laws with the restriction that four dollars per acre should be paid for them, and that they should be open to and subject to entry under these laws by proclamation of the President. This proclamation was made May 24, 1906, and since then a portion of the land has been taken by virtue of such proclamation and in compliance with its requirements, and the undisposed of portion, the Indian Department, with the sanction of the Secretary of the Interior, is seeking to exercise jurisdiction over by granting grazing privileges thereon for a price.

It will be noticed that the language of the Act is unqualified and unconditional. By it, the Indians cede, grant and relinquish to the United States all right, title and interest to the land. The United States undertakes to pay for the school sections to which the State of Montana gets title, and for the balance of the land it undertakes to pay over to the Indians four dollars an acre when the same is disposed of by it, and it undertakes to dispose of it by making applicable to it the homestead law, the townsite law and the mineral entry law with the limitation imposed that those acquiring title to the land should pay therefor the sum of four dollars per acre; this sum to be turned over to the Indians. We submit, as stated by Judge Gilbert in his dissenting opinion in this case (221 Federal 588) that the trust which the law created

extends only to the proceeds from the sale of the land, citing

United States v. Choctaw Nation, 179 U. S. 494,

and that the Act in question opened the land to settlement under the general land laws of the United States.

Bean v. Morris, 159 Fed. 651.

This court has declared, in order to make lands public lands, that it is not necessary they should be open to settlement under all the land laws of the United States.

United States v. Blendaur, 128 Fed. 910.

And there is nothing in the case of

Newhall v. Sangar, 92 U. S. 761,

holding to the contrary.

If these lands are open to exploration and settlement they are not reserved. The exercise of jurisdiction over them by the Indian Department through a leasing of same is incompatible with their being explored and settled upon under the homestead, townsite and mineral entry laws of the United States. By the proclamation of the President, the entryman is invited to go upon the land. His doing so is prevented by the land being leased by the Indian Bureau. The mineral entryman's right is not qualified by the condition that his going upon the land is dependent upon its not being leased to some person by the Indian Bureau. This is equally true as to the townsite claimant and the homestead entryman.

The construction given to this law in the decision rendered produces interminable complications and difficulties and leads to absurd results.

We respectfully submit that the decision heretofore made in this case should be reversed and that the judgment of the trial court should be ordered annulled and the action should be ordered dismissed.

Respectfully submitted,

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